SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1220

FORT SILL APACHE TRIBE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Claims

BRIEF OF AMICUS CURIAE NATIVE AMERICAN RIGHTS FUND

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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BRIEF OF NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Native American Rights Fund files the following brief *amicus curiae* with the consent of petitioner, Fort Sill Apache Tribe, and the respondent, the United States.

INTEREST OF AMICUS CURIAE

The Native American Rights Fund (hereinafter the Fund) is a private, non-profit corporation organized for the purpose of protecting the rights and enhancing the general welfare of American Indians and providing legal representation and counsel to Indians in cases of

major significance. The Fund appears and submits this brief *amicus curiae* because of its general interest in an equitable resolution to the claims of Indians Tribes against the United States.

This case will establish an important precedent as regards the jurisdictional scope of the Indian Claims Commission Act. Congress intended that the Act lay to rest once and for all time all historic claims by Indian Tribes against the United States. Because the decision of the Court of Claims effectively bars the Tribe from vindication for 27 years' internment, the Native American Rights Fund files this brief against the decision of the Court of Claims and in support of the petitioner.

STATEMENT OF THE CASE

In 1886 the United States Army seized all known members of the Fort Sill (Chiricahua) Apache Tribe. Men, women and children, the aged and infirm were shipped in railroad cars to Florida and interned as prisoners of war. The Tribe remained imprisoned for 27 years. During that time they were confined in Arizona, Florida, Alabama and Oklahoma. By the time the Tribe was released in 1913 its population had been reduced by one half and its ability to function politically and culturally was severely damaged. The Tribe sought compensation for these losses before the Indian Claims Commission and on appeal to the Court of Claims. Relief was denied in both forums on jurisdictional grounds.[1]

The Chiricahua Apache Tribe petitions this court for a writ of certiorari as a last resort to vindicate

[1] The Commission ruled 3-2 for dismissal and the Court of Claims affirmed in a 4-3 decision.

its claim that misfeasance by the United States in seizing and interning the Tribe for 27 years wrecked cultural disaster for which a remedy is available within the terms of the Indian Claims Commission Act.

ARGUMENT

I. Congress Intended that the Indian Claims Commission Act Provide a Forum for Adjudication of All Possible Indian Claims Against the Federal Government Once and For All Time

The record of injustice against Native Americans is irrefutable. Motivated by moral and political considerations, Congress early acknowledged its accountability to the Indian people for the wrong done to them by the United States government. But Anglo-American jurisprudence did not provide the unique remedies necessary for recovery from the destruction and dishonor which Indian people experienced during the fulfillment of the United States' manifest destiny. Nevertheless, promises made at treaty councils by the government did not fall on deaf ears. The Indian people persisted in their demands for an accounting and will continue to do so as long as they believe that the promises in good faith by the government retain substance and dignity.

A wholly satisfactory means of redress is perhaps unattainable but Congress has devoted considerable energy in response to historic grievances. Between 1881 and 1946, 142 Indian claims were heard in the Court of Claims.[2] Each claim required special legislation which waived statutes of limitation and sovereign immunity while carefully delimiting liability and

[2] *Hearings on H.R. 1341 and 1109 Before the House Committee on Indian Affairs* 79th Cong., 1st Sess. 163-66 (1945).

causes of action. Seizing even this limited opportunity, tribes worked tirelessly urging Congress to accommodate their claims.[3] However the piecemeal approach to Indian Claims proved to be so clumsy [4] that

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[3] Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 Geo. L.J. 511 (1966).

[4] Congressional frustration with Indian claims and desire for an effective resolution to them was expressed by Congressman Karl Mundt.

> "That process is enormously costly and unsatisfactory to everyone. It means that Government clerks and attorneys in the Interior Department, the Department of Justice and the General Accounting Office spend years and years examining and re-examining Indian claims in an effort to determine whether the Indians should have a day in court. . . . [A]nd of course, when a special jurisdictional bill is enacted, the process of investigation starts all over again. Then, only too often, the Court of Claims or the Supreme Court finds some fault with the language of the jurisdictional act, and the Indians come back for an amended jurisdictional act, and the merry-go-round starts up again. In the last 20 years the General Accounting Office alone spent over a million dollars ($1,000,000.) in reporting on Indian claims bills. And not one cent of that went to any Indian to settle any claim. Justice and Interior and the committees of Congress have probably spent comparable sums. That, in the judgment of your committee, threatens to be an endless waste of the taxpayers' money. This dilly-dallying with the claims problem, according to our Investigating Committee's findings, promises to 'continue to be a real roadblock on the path to Indian independence 100 years from now'. For that reason your special investigating committee recommended that legislation be adopted to fix the final date after which no more Indian claims would be considered by any agency or instrumentality of the Government and to provide for a claims commission that would find the facts and make final determinations on all pending Indian claims cases within a period not exceeding ten years. We ought to have a definite time table; we ought to know that, once having given the Indians a fair opportunity to present their cases, this chapter in our history and this expense to our taxpayers will be concluded once and for all. That is my chief concern in the bill that is before us." 92 Cong. Rec. 5316 (1946).

Congress determined to prepare a comprehensive and consistent set of criteria applicable to claims litigation. Spurred by the findings of the Meriam Report [5] Congress culminated its investigation of Indian claims by creating the Indian Claims Commission in 1946.[6]

Evidence abounds of congressional intent to provide in the Commission a judicial forum of unprecedented jurisdictional scope. Chairman of the House Committee on Indian Affairs, Henry M. Jackson (now Senator), speaking on behalf of the Indian Claims Commission Act said:

> "[L]et us make sure that when the Indians have their day in court they have an opportunity to present all their claims of every kind, shape, and variety, so that this problem can truly be solved once and for all without coming back to haunt us or our successors in the form of further bills to extend the jurisdiction that this bill would confer on an Indian Claims Commission. . . . It was the unanimous opinion of the committee that the jurisdiction of the Commission ought to be broad enough so that no tribe could come back to Congress 10 years from now and say that it had a meritorious claim which the Claims Commission was not authorized to consider." [7]

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[5] Meriam, *Problem of Indian Administration* (1928).

[6] 605 Stat. 1060, 25 U.S.C. § 70a, *et seq.*, Act of August 13, 1946. In the five year period between 1946 and 1951 in which claims could be lodged before the Indian Claims Commission, tribes and groups filed 370 original petitions. Those petitions contained a plethora of claims such that causes of action were separated for the sake of efficiency into 611 dockets. Approximately 200 dockets require final disposition. *Indian Claims Commission, Annual Report, 1973*, pgs. 2-3.

[7] 92 Cong. Rec. 5312 (May 20, 1946).

Passage of the Indian Claims Commission Act accomplished two objectives: the first was a waiver of sovereign immunity and statutes of limitation which barred causes of action recognized in Anglo-American Law. But the Act also created new causes of action; it made the government amenable to suit for wrongs done to the dependent sovereign nations with which the United States maintains a fiduciary relationship.[8] The scope of that trust is diminished by the decision of the Court of Claims in this case. The petitioner asks to be heard. If the Tribe is not given a hearing before the Commission it will have only to ask Congress for special legislation authorizing its claim. Because Congress intended to finally dispose of all claims in the Indian Claims Commission, it is highly unlikely that special legislation would be forthcoming. The Tribe asks only for a day in court, a forum in which to present its grievance in a dignified and thorough fashion.

For sixty years the devastating effects of captivity have haunted the petitioner. The horror of that experience will never be completely erased from memory. But the sorrow may be alleviated and some measure of dignity restored to both the United States and the Chiricahua Apaches by providing the Tribe an opportunity to be heard before the Indian Claims Commission. That was the very purpose of the Indian Claims Commission Act.

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[8] *E.g., United States* v. *Kagama*, 118 U.S. 375 (1886); *Message From the President of the United States Transmitting Recommendations For Indian Policy*, 116 Cong. Rec. 23258 (July 8, 1970).

II. Proof of a Special Relationship Is Not A Prerequisite to Recovery In This Case

As *amicus curiae* has demonstrated above, Congress intended that the Indian Claims Commission have jurisdiction broad enough to entertain *all* claims. Congress did not mention in the Indian Claims Commission Act, the hearings, or the reports any requirement that a special relationship be shown as a prerequisite to recovery of a moral claim. This requirement, which restricts the subject matter jurisdiction of the Commission, was created by judicial decision in *Lipan Apache Tribe* v. *United States.*[9] It was utilized to dismiss the claim in *Gila River Pima-Maricopa Indian Community* v. *United States.*[10]

The Tribe in this case should not be required to meet the burden of showing a special relationship. It bases its claim, at least in part, on Clause 5 of Section 2 of the Indian Claims Commission Act. The wording of Section 2(5) certainly does not indicate the necessity of an agreement which expressly obligates the United States. In fact, on its face and read in context, Section 2(5) appears to cover situations in which there are no explicit agreements. Whether there exists a special relationship between the United States and the Chiricahau Tribe is seemingly irrelevant because the Tribe bases its claim upon "fair and honorable dealings" *that are not recognized by any existing rule of law or equity.*

Requiring proof of a special relationship in this case is unnecessary for another reason. The Chiricahua allege tribal injury resulting from overt acts of

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[9] 180 Ct. Cls. 487 (1967).

[10] 190 Ct. Cls. 790 (1970).

commission on the part of the United States Government—namely the wrongful imprisonment of the entire tribe. The requirement of a special relationship first appears in *Lipan Apache Tribe* v. *United States.* In that case, however, the United States was held liable for its failure to protect the Indians, in other words, for failure to act in accordance with fiduciary standards. The *Gila River* case is, likewise, distinguishable from this case in that the alleged wrongs were acts of omission, namely, failure to provide adequate services.

Professor Prosser distinguishes acts of omission and acts of commission:

> *In the determination of the existence of a duty, there runs through much of the law a distinction between action and inaction.* In the early Common Law one who injured another by a positive, affirmative act, was held liable without great regard even for his fault. But the courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer harm because of his omission to act. Hence there arose very early a difference, still deeply rooted in the law of negligence, between "misfeasance" and "nonfeasance"—that is to say, between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm.[11]

Thus in the cases against the United States for its nonfeasance, i.e., failure to provide protection, services or adequate consideration, etc., the Court of Claims has required that some "special relationship" from either

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[11] Prosser, *The Law of Torts*, p. 338-39, 4th Ed. (1971). (emphasis supplied).

treaty, agreement or statutes be shown to establish a duty to protect the Indians. But where, as in this case, the claim is based on overt acts of commission as opposed to omission, it is unnecessary to demonstrate the existence of a special relationship as a prerequisite to recovery.

CONCLUSION

This claim does not involve, as suggested by the Court of Claims and the Indian Claims Commission, a question of standing or tort law and their ramifications with respect to liability. Rather the question is far more serious and goes to the heart of the United States' responsibility and respect for the sovereignty of Indian tribes whose presence preexisted the arrival of European colonists by thousands of years. It is whether all tribes will be heard in the Indian Claims Commission on all of their claims, finally, fully and fairly. Unless this question is answered in the affirmative there can be no settlement of the "Indian problem" in the foreseeable future. Congress vowed to permit Indian Tribes to present "all their claims of every kind, shape and variety." [12] The Act provides for causes of action to support claims heretofore unrecognized in Courts of the United States. Yet the Court

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[12] Whatever confusion exists over the propriety of hearing this claim may be due in part to the novelty of determining moral claims in a judicial forum. It appears certain that:

> "... had the wording of the Act been less emotionally weighted in terms of fair and honorable dealings and concerned instead with ethnological concepts of cultural integrity and functional expediency, it would permit objective presentation of facts on such matters and be no more far-fetched than such established legal precedent of claims based on 'mental anquish' or loss of companionship' . . . ." *Lurie, Problems, Opportunities and Recommendations* 2:4 Ethnohistory 372, 374 (1965).

of Claims constricted that broad jurisdiction Congress so clearly intended the Commission to exercise; it insists on categorizing this tribal claim merely as one for "wrongful arrest, imprisonment, and excessive punishment of some individual Indians."[13] *Amicus curiae* submits that the Indian Claims Commission Act is not so limited, but supports a wide variety of claims for cultural impairment. For these reasons, *amicus curiae* urges the court to grant the petition for certiorari.

Respectfully submitted,

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[13] 477 F.2d 1360, 1361.

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BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Association on American Indian Affairs, Inc. files the following brief *amicus curiae* with the consent of petitioner, Fort Sill Apache Tribe, and the respondent, the United States.

INTEREST OF AMICUS CURIAE

The Association on American Indian Affairs, Inc. is a non-profit membership corporation organized under the laws of the State of New York for the pur-

pose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians.

This case presents a question of great and continuing concern to the Association and to all American Indians —whether Section 2(5) of the Indian Claims Commission Act, which directs the Indian Claims Commission to "hear and determine . . . claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity", shall be given the broad construction Congress clearly intended. In the present case, the Association is concerned with this general issue in a specific context—namely, whether Section 2(5) authorizes a claim based on damages to the Fort Sill Apache Tribe caused by the United States' internment of all members of the Tribe for a period of twenty-seven years.

The Association submits the following brief to assist the Court in recognizing that the decision of the Court of Claims contravenes Congress' clearly expressed intent that Section 2(5) should cover claims such as petitioner's, which are based on moral and ethical considerations rather than principles of law and equity.

STATEMENT OF THE CASE

For generations prior to 1886 the Fort Sill (Chiricahua) Apache Tribe occupied as its homeland portions of what are now the country of Mexico and the states of Arizona and New Mexico. In the early 1870's the United States embarked on the first of a

number of efforts to confine the members of the Chiricahua Apache Tribe to several reservations. For over a decade these efforts met with only limited success, and the members of the Tribe continued to occupy and range over significant portions of their traditional domain.

In 1886 the Tribe's resistance to the armed forces of the United States finally collapsed, and one of the most disgraceful chapters in the already shameful history of the United States' relationship with American Indian tribes commenced. The United States Army proceeded to round up every man, woman, and child who belonged to the Tribe, and made no attempt to exclude from its sweep those members of the Tribe who had been living peacefully on the San Carlos Reservation, or—in a supreme demonstration of irony—those members of the Tribe who had served the Army as scouts.

The members of the Tribe were removed first to Fort Marion, Florida, and interned as prisoners of war. During the next twenty-seven years the Tribe remained imprisoned, and was confined at various times in Arizona, Florida, Alabama, and Oklahoma. By the time the United States released the Tribe in 1913 its membership had been reduced by half, and its political and cultural integrity was shattered.

The Chiricahua Apache Tribe sought compensation for these losses under Section 2(5) of the Indian Claims Commission Act. The Indian Claims Commission dismissed on the ground that the Tribe had failed to state a claim upon which relief could be granted, and the Court of Claims affirmed.

REASONS FOR GRANTING THE WRIT

The Indian Claims Commission dismissed petitioner's claim on the ground that claims brought under Section 2(5) are conditioned on the demonstration of a "special duty" owed to the claimant by the United States. The Commission held that before the Tribe could recover compensation for the damage to its culture and political structure caused by the 27-year internment, it must show that the United States had undertaken by treaty or statute the obligation not to inflict such harm.

The Indian Claims Commission Act and its legislative history provide absolutely no support for this judicially-imposed restriction on the jurisdiction of the Indian Claims Commission. To the contrary, Section 2(5) authorizes the Indian Claims Commission to consider claims "that are not recognized by any existing rule of law or equity", and therefore clearly contemplates claims based upon moral or ethical considerations regardless of whether the United States has undertaken an explicit obligation to prevent the harm complained of.

The legislative history of the Indian Claims Commission Act provides a telling affirmation of this interpretation of Section 2(5). The Chairman of the House Committee on Indian Affairs analyzed the purpose of the Indian Claims Commission Act in the following manner:

> [L]et us make sure that when the Indians have their day in court *they have an opportunity to present all their claims of every kind, shape and variety,* so that this problem can truly be solved once and for all without coming back to haunt us or our successors in the form of further bills to

> extend the jurisdiction that this bill would confer on an Indian Claims Commission . . . . *It was the unanimous opinion of the committee that the jurisdiction of the Commission ought to be broad enough so that no tribe could come back to Congress 10 years from now and say that it had a meritorious claim which the Claim Commission was not authorized to consider* . . . . [Emphasis added].

92 Cong. Rec. 5312 (1946) (Statement of Congressman Jackson). The report on the bill which became the Indian Claims Commission Act clearly reflected this position: "[I]t is essential that the jurisdiction to hear claims which is vested in the Commission be broad enough to include all possible claims . . . ." H.R. Rep. No. 1466, 79th Cong., 1st Sess. 10 (1946).

Furthermore, representatives of the Department of Justice clearly pointed out to the members of Congress that the breadth of jurisdiction they proposed to grant under the Indian Claims Commission Act was unprecedented. The Attorney General observed that the legislation embraced not only claims based on principles of law or equity, but also ". . . those claims which are based solely on *moral or ethical grounds and are not ordinarily justiciable in a court.*" (Emphasis added). Letter from Attorney General Clark to Congressman Cochran, quoted in 92 Cong. Rec. 5310 (1946).

The Attorney General also made a specific reference to the provisions in Section 2(5). He explained that the "fair and honorable dealings" clause provided for the ". . . disposition of certain claims which cannot be ordinarily considered by judicial tribunals and the determination of which would depend upon vaguely defined principles of moral philosophy and fair dealings." Letter from Attorney General Clark to

Congressman Cochran, quoted in 92 Cong. Rec. 5310 (1946).

At the hearings on the Indian Claims Commission Act another representative of the Department of Justice again emphasized the same conclusion:

> [T]here is something very extraordinary here because for the first time . . . claims by all of these tribes are going to be heard by a commission on a moral basis, with no precedents. What are to be the precedents? What is a moral claim? . . . [T]his Commission under this scheme has greater power than a court. No court hears claims on a moral basis. It is a tremendous power proposed to be given this Commission . . . .

Hearings on H.R. 4497 before the Senate Committee on Indian Affairs, 79th Cong., 2d Sess. 62-63 (1946).

Despite all these comments about the unprecedented grant of jurisdiction embodied in Section 2(5), Congress nevertheless enacted the Indian Claims Commission Act. At no time did Congress indicate that its broad grant of jurisdiction should be limited in any manner. More important, nothing in the Act or its legislative history supports in the least the proposition that an Indian tribe's invocation of Section 2(5) must be conditioned on the demonstration of a "special duty" owed by the United States to the tribe.

CONCLUSION

The imprisonment by the United States of an entire people is a wrong. See Ex Parte Endo, 323 U.S. 283 (1944). Both the Congress and the courts repeatedly have observed that Section 2(5), which authorizes Indian tribes to raise claims based on moral and ethi-

cal considerations, represents the Indian Claims Commission Act's most far-reaching provision and its most distinctive characteristic. The lower court's decision in the present case limits this expansive grant of jurisdiction in direct contravention of the language in Section 2(5) itself and the explicitly expressed intent of Congress.

More important, the requirement that a "special duty" be shown before jurisdiction under Section 2(5) can be invoked to right the wrong done petitioner raises again the question which Congress attempted to dispose of almost a generation ago—namely, whether Indian tribes will be given the opportunity to have all of their claims heard before the Indian Claims Commission. Unless this question is answered in the affirmative, little hope exists that the "Indian problem" will be settled in the foreseeable future.

For these reasons, *amicus curiae* urges the court to grant the petition for certiorari.

Respectfully submitted,

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